RECENT CASES

BANKS AND BANKING—NATIONAL BANKS—STATUTORY LIABILITY—NOTICE OF PROPOSED CONSOLIDATION AS AMOUNTING TO CONSENT TO TAKE SHARES—The defendant shareholder in a trust company received notice of a stockholders' meeting at which time a proposed consolidation with a national bank was to be considered, but he failed to attend. The consolidation was consummated and the defendant was registered as owner of shares of the national bank, of which proceedings he was ignorant, the share certificates and dividend checks being retained by the bank. Subsequently the bank became insolvent and the receiver sued to impose double liability,[1] at which time the defendant first learned of the events. *Held,* that the defendant was liable as a "shareholder" since he consented to the consolidation and the ownership of the shares. *Littrell v. Craig,* 1 F. Supp. 491 (W. D. Pa. 1932).

Statutes imposing double liability upon shareholders of banks are primarily enacted to protect creditors and establish confidence in relationships with these institutions.[2] In order to further this purpose and avoid the possibility of evading the statute, the courts [3] have followed a comparatively strict rule of law in levying the assessments on the registered owner,[4] provided he can be said to have consented to having his name appear thereon.[5] No general statement however, can be made as to when there is consent, for the individual merits of each case must decide that.[6] Thus, where a wife did not know of a failure to transfer shares erroneously issued in her name by her husband, the court refused to recognize any liability.[7] If, however, there is any evidence of consent, such as endorsing a dividend check [8] or by outright acts recognizing the ownership,[9] the court will permit the assessment. Mere inaction with knowledge of the registration will also be sufficient.[10] Having little basis for the finding of any consent in fact, the court in the instant case, by holding that notice of the meeting was sufficient to visit him with knowledge of the proceedings, managed to extend the concept to fit the situation. For by thus imputing knowledge, it brought the defendant within the operation of a statute [11] which provides that consent to such

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[1] REV. STAT. 5151 (1878), 12 U. S. C. A. § 63 (1927).

[2] Scott v. Dewees, 181 U. S. 202, 213, 21 Sup. Ct. 585, 589 (1901).

[3] Kenyon v. Fowler, 155 Fed. 107 (C. C. A. 2d, 1907), *aff'd* 215 U. S. 593 (1910). See Pauly v. State Loan & Trust Co., 165 U. S. 606, 17 Sup. Ct. 465 (1897). Who is a "shareholder" is determined by the names appearing on the books of the bank. Great Northern Railway Co. v. Sutherland, 273 U. S. 182, 47 Sup. Ct. 315 (1927).

[4] An exception to this is where he appears on the books in some other capacity such as pledgee. Pufahl v. Fidelity National Bank, 40 F. (2d) 25 (C. C. A. 10th, 1930). For a thorough discussion concerning those persons liable under the double liability statute see Note (1932) 80 U. OF PA. L. REV. 1133. The real owner, the one beneficially interested, is always liable. McCandless v. Haskins, 20 F. (2d) 688 (D. S. D. 1927). See Corker v. Soper, 53 F. (2d) 190 (C. C. A. 5th, 1931) where the defendant signed on the books of the bank as agent of a corporation which he had organized for the sole purpose of holding these shares. The court went behind the veil of corporate entity and held him liable as the real owner.

[5] Williams v. Vreeland, 250 U. S. 295, 39 Sup. Ct. 438 (1919).

[6] See Finn v. Brown, 142 U. S. 56, 12 Sup. Ct. 136 (1891).

[7] Williams v. Vreeland, *supra* note 5. A similar situation arose in regard to double liability on shares of a state bank. Smith v. Sogn, 55 S. D. 491, 226 N. W. 729 (1929).

[8] Keyser v. Hitz, 133 U. S. 138, 10 Sup. Ct. 290 (1890).

[9] Rust v. MacLaren, 29 F. (2d) 288 (D. Kan. 1928).

[10] Kenyon v. Fowler, *supra* note 3.

[11] The consent involved in the principal case was primarily to the consolidation and the Federal statute applicable apparently covers the situation when it provides that objection "may" be made within 20 days of approval by one "who has not voted for such consolidation". 44 STAT. 1225 (1927), 12 U. S. C. A. SUPP. 34a (1932).

a consolidation will be assumed in the absence of a dissent filed within twenty days. Though the legal rule thus evolved imposes an extraordinary burden upon the small investor who usually disregards notices of meetings, the decision [12] is quite in accord with the usual policy of the courts [13] to impose double liability wherever possible.[14]

BROKERS—BLUE SKY LAWS—RELATION OF BROKER AND CUSTOMER—BROKER'S PROCURING OF SHARE CERTIFICATES FOR CUSTOMER AS "SALE"—Plaintiff ordered defendant broker to procure certain shares for him. Defendant purchased the shares from another broker, sent a covering statement to plaintiff and delivered the certificates to plaintiff upon payment of the price a few days later. A statute [1] provided that no securities of the class purchased should be "sold" until a notice of intention to sell such shares had been filed with the securities commission. The only notice of intention with respect to shares of this class was filed by another broker after plaintiff's purchase thereof. Two years later, upon plaintiff's ascertainment of the original non-registration, he tendered the certificates to defendant demanding return of his consideration. *Held,* that the "sale" by defendant, not complying with the statute, was "void" and that purchaser might recover the sum paid. *Kneeland v. Emerton,* 183 N. E. 155 (Mass., 1932).

"Blue Sky Laws" were created to protect the investing public against "sales" of fraudulent securities.[2] The public policy underlying such legislation is so strong that, even in the absence of statutory authority, the instant court, following the trend of judicial opinion,[3] declared that a "sale" made without prior compliance with the securities act might be rescinded by purchaser. The court, however, must find that the person against whom the purchaser seeks rescission is a "seller" within the implications of the statute. Generally, the broker-customer relationship has not been held to constitute what is thought of as a sale.[4] It is

[12] *Cf.* Rivers *et al.* v. McIntire, 160 S. C. 462, 158 S. E. 816 (1931). The facts in this case were even stronger than in the principal case for the defendant knew of all the proceedings but made no objection, but he received no benefits as a shareholder. However, the statute under consideration, as set forth at 468, 158 S. E. at 818, was comparatively clear, "Each shareholder . . . who is entitled to vote and who does not vote against the consolidation . . . shall cease to be a shareholder in such constituent corporation and shall be deemed to have assented to the consolidation. . . ." See S. C. CODE OF LAWS (Michie, 1932) § 7759.

[13] Note (1932) 41 YALE L. J. 583, 591.

[14] An interesting query arises as to whether the court would still call the defendant a "shareholder" if he was trying to assert a right, such as to dividends, under the facts of the principal case. The policy of protecting creditors would not be involved.

[1] MASS. GEN. LAWS (Tercentenary ed., 1932) c. 110A.

[2] ELLIOTT, ANNOTATED BLUE SKY LAWS (1919) 1 *et seq.;* Wham, *Rights Under Blue Sky Laws* (1929) 15 A. B. A. J. 310; see Dalton, *The California Corporate Securities Act* (1929) 18 CALIF. L. REV. 115, 116. For annotated texts of the various "Blue Sky Laws" see COWAN, MANUAL OF SECURITIES LAWS AND SERVICE (1929); REED & WASHBURN, BLUE SKY LAW SERVICE (1924). See also HILLYER, CORPORATE MANAGEMENT AND BY LAWS (1927) 410 *et seq.;* MILLS, FRAUDULENT SECURITIES (1925) *passim.*

[3] Reilly v. Clyne, 27 Ariz. 432, 234 Pac. 35 (1925); Otten v. Riesener Choc. Co., 82 Cal. App. 83, 254 Pac. 942 (1927); Edward v. Ioor, 205 Mich. 617, 172 N. W. 620 (1919); Landwehr v. Lingenfelder, 249 S. W. 723 (Mo. App. 1923). See principal case at 158. *Cf.* Warren People's Market Co. v. Corbett & Sons, 114 Ohio St. 126, 151 N. E. 51 (1926) where the Ohio court did not believe that the intent of the legislature was to avoid sales. This was criticized in (1926) 35 YALE L. J. 881. See also Watters & Martin v. Homes Corp., 136 Va. 114, 116 S. E. 366 (1923). The Virginia statute, however, contains a clause to the effect that the statute is not to prevent sales of fraudulent securities but to force promoters to properly apply proceeds of securities sales. VA. CODE ANN. (Michie, 1930) § 3848 (61).

[4] In Markham v. Jaudon, 41 N. Y. 235 (1869) it was stated, at 244: "Neither was the transaction an executory contract of sale, in which the law of vendor and vendee, would apply

held that a broker purchasing securities for a customer, at his request, is a converter if he thereafter sells or pledges the shares for his own account, no matter whether the broker has advanced all or part of the price therefor.[5] Moreover, the customer is thenceforth entitled to increases in the value of the securities, and is burdened with loss resulting from a decrease in their value.[6] Likewise, as between broker and customer, an order that the broker procure certain securities for the customer has been held to be outside of the Statute of Frauds.[7] In Massachusetts, however, margin accounts were originally considered as executory contracts of "purchase and sale".[8] Margin customers were held to have no "property" interest in securities procured at their request which would permit them to maintain trover [9] against the broker who pledged securities purchased by him on their accounts. Likewise, securities so purchased were taxable as the property of the broker.[10] Massachusetts, however, now considers the broker as quasi-trustee of legal title, of the shares, for the benefit of the customer who, upon broker's insolvency, subject to the rights of the broker's pledgee, may reclaim securities purchased at his request so long as they may be identified.[11] The broker is also bound to keep control of a sufficient amount of the shares ordered for availability to the customer upon payment.[12] Reinforced by this historical background, the instant court felt justified in treating this transaction as a "sale." In view, however, of the protectionist policy of this statute,[13] the part the broker plays in facilitating the transfer of securities and his probable knowledge of the legal requirements before sales of securities are consummated, the instant court, might well have held that, irrespective of the Massachusetts peculiarities, the statute itself was intended to apply to the transaction in question, and that the broker's function was that of "seller" within the meaning of the legislature.[14]

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to the parties. The plaintiff bought no shares of the defendant. The defendant sold nothing to the plaintiff. Both parties understood the fact to be the reverse of this, *viz.*, that the shares had been purchased from some third person. . . ."

[5] Content v. Banner, 184 N. Y. 121, 76 N. E. 913 (1906) (broker's sale of shares purchased for customer was a conversion); Sterling's Estate, 254 Pa. 155, 98 Atl. 771 (1916) (broker's pledge of margin shares held a conversion).

[6] Richardson v. Shaw, 209 U. S. 365, 378, 28 Sup. Ct. 512, 516 (1908); Eddy v. Schiebel, 112 Conn. 248, 253, 152 Atl. 66, 68 (1931); Markham v. Jaudon, *supra* note 4, at 239.

[7] Campbell v. Willis, 290 Fed. 271 (App. D. C. 1923); Libaire v. Feinstien, 133 Misc. 27, 231 N. Y. Supp. 3 (1928); MEYER, LAW OF STOCK BROKERS AND STOCK EXCHANGES (1931) 249. But see Adams v. Thayer's Estate, 85 N. H. 177, 155 Atl. 687 (1931).

[8] Shaw, C. J., stated in Wood v. Hayes, 81 Mass. 375 (1860): "The contract was strictly conditional, to deliver so many shares upon payment of so much money." This was reiterated in Covell v. Land, 135 Mass. 41, 44 (1883) (broker's sale of margin shares was not a conversion) and was included by implication in Weston v. Jordan, 168 Mass. 401, 47 N. E. 133 (1897) (delivery of margin shares by broker, after insolvency, held a preference). See Smith, *Margin Stocks* (1922) 35 HARV. L. REV. 485, 492 *et seq.*

[9] Wood v. Hayes, *supra* note 8.

[10] Chase v. Boston, 180 Mass. 458, 62 N. E. 1059 (1902).

[11] Smith, *supra* note 8, at 501 *et seq.*; Lavien v. Norman, 55 F. (2d) 91, 93 (C. C. A. 1st, 1932).

[12] See Greene v. Corey, 210 Mass. 536, 548, 97 N. E. 70 (1912).

[13] See *supra* note 2.

[14] See MILLS, supra note 2, at 73, where he intimates that where a broker purchases securities pursuant to order and delivers them to his customers upon payment of the price, the transaction would be a sale within the meaning of the New York "Blue Sky Law" which forbade "a sale or offer to the public" of certain securities prior to publication thereof. See also Zapf v. Ridenour, 198 Iowa 1006, 200 N. W. 618 (1924) where it was held that a statutory bond given by a broker, who under a statute was forbidden from knowingly making false representations to customers in consummating a sale, inured to the benefit of a defrauded customer despite the fact that the investor solicited broker to purchase securities for him. *Cf.* Noll v. Woods, 231 Mich. 224, 203 N. W. 848 (1925).

CONDITIONAL SALES—EFFECT OF FAILURE TO REFILE CONDITIONAL SALE CONTRACT WITHIN THE TIME PRESCRIBED BY THE UNIFORM CONDITIONAL SALES ACT—The Act provides that "the filing of conditional sale contracts . . . shall be valid for a period of three years only . . . The validity of the filing may be extended for successive additional periods of one year from the date of refiling by filing . . . a copy of the original contract within thirty days next preceding the expiration of each period." [1] A contract dated January 25, 1928, was filed on September 26, 1928, and refiled October 8, 1931 (12 days after the last thirty days of the three year period had elapsed). On October 15, 1931 the conditional vendee was adjudicated bankrupt and a trustee in bankruptcy was appointed. The conditional vendor sued to recover the conditionally sold goods from the trustee. *Held,* that the conditional sale was void against the trustee in bankruptcy. In re *Kaufman et al.,* 1 F. Supp. 368 (N. D. N. Y. 1932).

Although it has been held that recording acts must be interpreted literally in the absence of ambiguity,[2] recording statutes are remedial and should be liberally construed so as to attain the object intended by them.[3] It is indisputable that the underlying aim and purpose of the filing requirements are to safeguard the rights of those who might otherwise rely upon the conditional vendee's apparent ownership.[4] In the instant case, however, the court, strongly influenced by an unfortunate analogy to mortgages [5] decided that "invalid" under the statute meant absolutely void; [6] and accordingly rendered judgment against the conditional vendor who omitted to refile within the specified time even though such non-conformity with the statute in no way prejudiced the rights of the particular party (trustee in bankruptcy) who was allowed to recover. In view of the fact that an original filing, however belated, is admittedly valid against any lien which comes subsequent in time,[7] the result reached in the instant case is strikingly inconsistent. Evincing a willingness to extend full protection to the conditional vendor who may neglect to file at all for three years and twelve days, the

[1] N. Y. PERS. PROP. LAW (1922) § 71.

[2] Flynn v. Garford Motor Co., 149 Wash. 264, 270 Pac. 806 (1928).

[3] General Motors Acceptance Corp. v. Mayberry, 195 N. C. 508, 142 S. E. 767 (1928); Benner v. Scandinavian American Bank, 75 Wash. 488, 131 Pac. 1149 (1913).

[4] 2 U. L. A. (1922) § 5, Commissioner's Note; 2a U. L. A. (1922) Chap. 5, § 52; (1933) 81 U. OF PA. L. REV. 465.

[5] The analogy to mortgage cases was ill-taken for historical reasons, first on the ground that mortgages were regarded in an unfavorable light, whereas conditional sales have always been widely accepted at the common law. Second, "New York legislation has treated the two separately and in noticeably different language. Section 230 of New York Lien Law (Consol. Laws, c. 33) declares an unfiled chattel mortgage 'absolutely void as against the creditors of the mortgagor, while Section 65 of N. Y. Pers. Prop. Law avoids an unfiled conditional sale only in favor of lien creditors' ". Quinn v. Bancroft-Jones Corp. *et al.,* 18 F. (2d) 727, 728 (C. C. A. 2d, 1927). Also under mortgage statutes a receiver could assert the invalidity of a contract due to failure to file—under UNIFORM CONDITIONAL SALES ACT he cannot.

As a matter of fact there is much, even in mortgage law, which would warrant an opposite result in the instant case. It has been held, for example, that where a chattel mortgage is not refiled within the proper time its lien is restored by a subsequent filing as against an execution creditor whose execution is not levied until after the refiling. Swift v. Hart, 12 Barb. 530 (N. Y. 1850); Nixon v. Stanley, 33 Hun. 247 (N. Y. 1884); Prudence-Bonds Corp. v. 1000 Island House Co., Inc., 141 Misc. 39, 252 N. Y. Supp. 60 (1931).

[6] Convinced that the sale could not be valid, the court thought that the necessary alternative was that it should be deemed absolutely void. The more normal interpretation, it seems, would be to regard the sale void only as to those persons already designated in § 65, namely, those who rely ("without notice, acquire a lien before the contract shall be filed").

[7] Courts so hold both in mortgage cases and in case of the conditional sales. *In re* Avlon Syrup Corp., 25 F. (2d) 342 (N. D. N. Y. 1928); *In re* Mayers *et al.,* 24 F. (2d) 349 (C. C. A. 2d, 1928); Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50 (1915); Andrews Paper Co. v. Southern Soda Fountain Co., 46 App. D. C. 84 (1917).

court nevertheless refuses to recognize that he possesses any rights at all when he refiles but twelve days after the original filing has lost its effect.[8] To place such a construction upon the statute is to make it unjustifiably punitive in its nature, as well as to lose sight of the mischief it was intended to remedy.

CONSTITUTIONAL LAW—ADMIRALTY—POWER OF CONGRESS TO IMPOSE LIMITATIONS ON VENUE OF THE STATE COURTS WHEN THE LATTER ARE ENFORCING FEDERAL RIGHTS—Section 33 of the *Jones Act* (*Merchant Marine Act of 1920*) gives to injured seamen the same rights given to railway employees under the *Federal Employers' Liability Act*,[1] and provides that "Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located." The action in the principal case was brought in the Court of Common Pleas of Philadelphia County, Pennsylvania, for an injury sustained by plaintiff as a member of the crew of a steamship operated by defendant, a Maryland corporation, registered to do business in Pennsylvania. Defendant moved to dismiss the action for want of jurisdiction on the ground that it was a resident in Maryland,[2] and maintained its principal office in Baltimore. Motion sustained and action dismissed. *Held*, that this provision applies only to the federal courts, and when action is brought in state courts the state provisions as to venue shall apply, and, therefore, the state court should have assumed jurisdiction. *Bainbridge v. Merchants' & Miners' Transp. Co.*, 53 Sup. Ct. 159 (1932).[3]

State courts have concurrent jurisdiction with the federal courts to enforce the right of action established by the *Jones Act*.[4] Several lower federal court cases have held, either expressly or by implication, that the provision relating to "jurisdiction" applies to both federal and state courts,[5] and when applied to state courts, the word "district" means "county", or whatever other division comparable to "district" may be used under the law of a particular state.[6] How-

[8] This result is regrettable since it disregards the fact that the sole end sought by recording acts is to impart notice. Moneyweight Scale Co. v. Hale-Halsell Grocery Co., 57 Okla. 135, 56 Pac. 1187 (1916). Under the present interpretation, the Act is given the effect of a statute of limitations. See Morrison v. Farmers and Traders State Bank, 70 Mont. 146, 225 Pac. 123 (1924). It is submitted that the fault lay, in a small part, with the legislature, which could have accomplished its purpose by a simpler and more equitable method, namely, that of the West Virginia legislature. Section 30 of the Act of 1925 (Laws 1925, c. 64) holds that after the period of the validity of the filing lapsed, the contract was to be removed from the files and destroyed. This would leave the vendor in the same position as if he had not filed originally, and would allow him to protect himself by filing at any time before the rights of the third party intervene.

[1] "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . ." 41 STAT. 1007 (1920), 46 U. S. C. A. § 688 (1926), amending 38 STAT. 1185 (1915).

[2] *I. e.*, since it was a Maryland corporation. See St. Louis v. Ferry Co., 11 Wall. 423, 429 (U. S. 1870).

[3] *Rev'g* 306 Pa. 204, 159 Atl. 19 (1932), which had affirmed the decision of the Court of Common Pleas.

[4] See *In re* East River Co., 266 U. S. 355, 368, 45 Sup. Ct. 114, 115 (1924); Engel v. Davenport, 271 U. S. 33, 37, 46 Sup. Ct. 410, 412 (1925); also cases cited *infra* note 7. This view is supported by the fact that the Jones Act incorporates the Federal Employers' Liability Act by generic reference, and the latter specifically provides for concurrent jurisdiction. 36 STAT. 291 (1910), 45 U. S. C. A. § 56 (1926).

[5] Carceres v. United States Shipping Board Emergency Fleet Corp., 299 Fed. 968 (E. D. N. Y. 1924); Wienbroer v. United States Shipping Board Emergency Fleet Corp., 299 Fed. 972 (E. D. N. Y. 1924); Villiard v. United States Shipping Board Emergency Fleet Corp., 1 F. (2d) 570 (E. D. N. Y. 1924).

[6] Wienbroer v. United States Shipping Board Emergency Fleet Corp., *supra* note 5, at 973.

ever, the majority of cases, by restricting the meaning of the word "district", have limited the application of the provision to federal courts.[7] The Supreme Court follows the majority view on the ground that Congress intended to affect only federal courts.[8] However, since the provision has been held to govern venue rather than general jurisdiction,[9] the minority view, followed by the Pennsylvania courts in this case,[10] raises the question whether Congress, in granting such concurrent jurisdiction, may interfere with the provisions of the several states fixing the venue of their courts. Since a state court exists by virtue of the constitution and laws of the state, the powers, jurisdiction and procedure of the court must be derived from and determined by such laws.[11] It is well settled that Congress, in legislating on such a subject as that involved in this case, has the power to vest either an exclusive jurisdiction in the federal courts [12] or a concurrent jurisdiction in the federal and state courts.[13] In the latter instance, however, Congress may provide for enforcement only in state courts of competent jurisdiction, and may not extend the established jurisdiction,[14] the jurisdiction of state courts being a matter for local regulation. By the same reasoning, it would seem to follow that Congress should not interfere with the established venue of the state courts, venue similarly being a matter for local regulation. This reasoning would clearly be applicable if the dispute is as to which of two courts of the same state shall hear the cause.[15] It would not necessarily follow, however, that Congress could not confer the power to try on the courts of one state in such a situation, and deny it to the courts of another, for

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[7] Lynott v. Great Lakes Transit Corp., 202 App. Div. 613, 195 N. Y. Supp. 13 (1922), *aff'd* 234 N. Y. 626, 138 N. E. 473 (1922); Patrone *et al.* v. M. P. Howlett, Inc., 237 N. Y. 394, 143 N. E. 232 (1924); State *ex rel.* Sullivan v. Tazwell, 123 Ore. 326, 262 Pac. 220 (1927).

[8] Principal case at 160. In adopting this view, the Supreme Court adheres to the principle that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." United States v. Jin Fuey Moy, 241 U. S. 394, 401, 36 Sup. Ct. 658, 659 (1915). See also United States v. Delaware & Hudson Co., 213 U. S. 366, 407-408, 29 Sup. Ct. 527, 535-536 (1908); Baender v. Barnett, 255 U. S. 224, 226, 41 Sup. Ct. 271, 272 (1921); Panama R. Co. v. Johnson 264 U. S. 375, 390, 44 Sup. Ct. 391, 395 (1923).

[9] Carceres v. United States Shipping Board Emergency Fleet Corp., *supra* note 5, at 970. See also Panama R. Co. v. Johnson, *supra* note 8, at 384-385, 44 Sup. Ct. at 393.

[10] See *supra* note 3.

[11] The fact that the Federal Constitution, which is a delegation of powers, contains no provision giving Congress the power to regulate state courts or proceedings therein would seem to add force to this conclusion.

[12] ". . . where a right arises under a law of the United States, Congress, may, if it see fit, give to the Federal courts exclusive jurisdiction. See remarks of Mr. Justice Field in The Moses Taylor, 4 Wall. 429, and Story, J., in Martin v. Hunter's Lessee, 1 Wheat. 334; and of Mr. Justice Swayne, in Ex parte McNeill, 13 Wall. 236." Claflin v. Houseman, 93 U. S. 130, 131 (1876).

[13] *E. g.* The Employers' Liability Act of April 22, 1908, 35 STAT. 65, c. 149, as amended April 5, 1910, 36 STAT. 291, c. 143, provides for concurrent jurisdiction. This portion of the act was upheld in Mondou v. New York N. H. & H. R. R. Co. (The Second Employers' Liability Case), 223 U. S. 1, 32 Sup. Ct. 169 (1911). On this subject see also Claflin v. Houseman, *supra* note 12.

[14] See excellent discussion in Mondou v. New York, N. H. & H. R. R. Co., *supra* note 13, at 56, 32 Sup. Ct. at 178.

[15] "The question of the jurisdiction of the state courts to entertain this action being settled by Act of Congress, we are now come to a mere question of venue and not of jurisdiction. Congress may create rights and provide for their enforcement in the state courts, and, in such cases those courts may not decline jurisdiction. But Congress may not go farther and govern the state courts on questions of venue, nor direct where or within what limited portion of the state its courts may function with respect to cases within their jurisdiction. That is a question for local regulation and state authority." Doll v. Chicago, Great Western R. R. Co., 159 Minn. 323, 325, 198 N. W. 1006, 1007 (1924).

there jurisdiction and not venue would be involved. This problem, however, did not arise in the principal case, since the court, very properly, has interpreted the clause to apply only to federal courts.

CONSTITUTIONAL LAW—BUILDING AND LOAN ASSOCIATIONS—IMPAIRING OBLIGATION OF CONTRACT—VALIDITY OF STATUTE REMOVING STATUTORY RIGHT OF ACTION—Plaintiff gave a notice of withdrawal from a building and loan association under an act of 1925 [1] which provided that if members were not paid within six months after notice they had a right of action against the association. Before the six months had elapsed an amendment [2] was passed providing that claims of matured stock should be paid first, and that withdrawing shareholders had no right of action so long as the funds were thus applied. Plaintiff, having been refused payment, brought suit contending that his rights were governed by the 1925 act, and that the amendment violated the "contract clause" of both the State [3] and Federal [4] constitutions. The general corporation act [5] reserved the right to the legislature to change corporate charters. *Held,* that plaintiff could not recover as the statute removing the right of action was constitutional and governed his rights. *Fornataro v. Atlantic Coast B. & L. Ass'n,* N. J. Sup. Ct. U. S. Daily, Dec. 16, 1932, at 1840.

The court here was faced by the desirability of holding the 1932 amendment valid in the face of the constitutional provision against impairment of contracts. In order to do so it rested its decision on the following three grounds: first, that the right of withdrawal and the right of action for non-payment conferred by the 1925 act were merely privileges which the legislature could change at will; second, that the amendment was proper under the power reserved to the legislature to alter, amend, or repeal corporate charters [6]; third, that the amendment was valid as an exercise of the police power.[7] It is not sufficient to say that the act of 1925 created only a privilege. A contract was made under its authority between the association and the shareholders upon the latter becoming members, because the law of the state in existence at the time a contract is made enters into and becomes a provision of that contract.[8] The cause of

[1] N. J. COMP. STAT. (Cum. Supp. 1925) § 27-R(52).

[2] N. J. Laws 1932, C. 102 (1932).

[3] N. J. CONST., Art. IV, § 7, par. 3.

[4] UNITED STATES CONSTITUTION, Art. I, § 10.

[5] Gen. Corp. Act, 2 COMP. STAT. 1600, § 4 provides, "The charter of every corporation, or any supplement thereto or amendment thereof, shall be subject to alteration, suspension, and repeal, in the discretion of the Legislature . . ."

[6] *Supra* note 5.

[7] A common contention, in suits attacking the validity of a statute like the amendment of 1932 in the principal case, is that it is merely a change in procedure and therefore does not violate the constitutional provision against impairment of contracts. This question was not raised in the present case. It is held that state legislatures may change purely procedural matters, providing an adequate means of enforcing the right remains, without violating the "contract clause". Terry v. Anderson, 95 U. S. 628 (1877). In other words, procedure may only be changed where no substantial right is taken away. Bronson v. Kinsey, 1 How. 311 (U. S. 1843) (Statute which provided that the equitable estate of a mortgagor shall continue for twelve months after a foreclosure sale was held unconstitutional as to prior mortgages); Louisiana v. New Orleans, 102 U. S. 203 (1880); Brine v. Insurance Co., 96 U. S. 627 (1877); McCracken v. Hayward, 2 How. 608 (U. S. 1844); Harrison v. Remington Paper Co., 140 Fed. 385 (C. C. A. 8th, 1905). It seems, under this authority, that the act of 1932 in the principal case could not be held valid as a mere change in procedure. It lessens the value of the contract and takes away a substantial right. Planter's Bank v. Sharp, 6 How. 301 (U. S. 1848) (at 327, the court said, "One of the tests that a contract has been impaired is that its value has by legislation been diminished").

[8] Hawthorne v. Calef, 2 Wall. 10 (U. S. 1864); Coombes v. Getz, 285 U. S. 434 (1932), (1932) 80 U. OF PA. L. REV. 1160; Barnitz v. Beverly, 163 U. S. 118 (1896); Brine v. Insurance Co., *supra* note 7; Von Hoffman v. City of Quincy, 4 Wall. 535 (U. S. 1866); McCracken v. Hayward, *supra* note 7.

action was not purely statutory, but arose "upon the contractual liability created in pursuance of the rule".[9] The second ground for the decision is no more valid than the first. Most states have reserved a power to alter, amend, or repeal corporate charters.[10] But this power is restricted to changing the charter, or laws with respect thereto, and does not authorize the legislature to impair contractual relations existing between a corporation and shareholders.[11] The contract right asserted in the principal case is not one arising from the grant of the charter, but is one between the corporation and shareholders distinct from any rights granted to the corporation or shareholders by the charter, and does not come within the exercise of this reserved power. As to the third basis for the court's decision, it is uniformly held that legislatures may, in fact, impair contract obligations if it is done under a valid exercise of the police power.[12] What is covered by a proper exercise of the police power is, of course, as much open to question in this situation as in any other. It seems, however, that a state may make regulations designed to protect or perfect the financial stability of corporations.[13] Since the object of the amendment in the principal case was to prevent a "run" on building and loan associations by withdrawing shareholders, in view of the present precarious financial condition of such associations, this ground adopted by the court would seem to be a valid one.

CONSTITUTIONAL LAW—DUE PROCESS—VALIDITY OF STATUTE VOIDING WAIVER OF WARRANTY OF FITNESS OF FARM MACHINERY—A South Dakota statute provided that a purchaser of farm machinery for his own use should be permitted within a reasonable time to rescind the contract of purchase if the

[9] Coombes v. Getz, *supra* note 8, at 442. The court said further, at 442, "Although the latter (contractual liability) derived its being from the former (statute), it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth".

[10] Garey v. St. Joe Mining Co., 32 Utah 497, 91 Pac. 369 (1907); Zabriskie v. Hackensack and N. Y. R. Co., 18 N. J. Eq. 178 (1867); see County of Santa Clara v. Southern Pac. R. Co., 18 Fed. 385, 406 (C. C. D. Cal. 1883).

[11] Yoakam v. Providence Biltmore Hotel Co., 34 F. (2d) 533 (D. R. I. 1929); Garey v. St. Joe Mining Co., *supra* note 10 (corporation law provided that articles of agreement could not be amended so as to make stock assessable without the consent of all the stockholders; later amended so that only two thirds need assent; held, that it was not within the reserve power of the legislature to so change a contract between shareholders); Intesio v. Metro. Sav. & Loan Ass'n, 68 N. J. L. 588, 53 Atl. 206 (1902); *In re* Election of Directors of Library Ass'n, 64 N. J. L. 217, 43 Atl. 435 (1899); County of Santa Clara v. Southern Pac. R. Co., *supra* note 10; Zabriskie v. Hackensack & N. Y. R. Co., *supra* note 10; Bank of Old Dominion v. McVeigh, 20 Grat. 457 (Va. 1871); (1930) 14 MINN. L. REV. 413; MORAWETZ, PRIVATE CORPORATIONS (2d ed. 1886) § 1101; see Snook v. Ga. Improvement Co., 83 Ga. 61, 65, 9 S. E. 1104, 1105 (1889); see R. R. Co. v. Maine, 96 U. S. 499, 510, 511 (1877).

[12] Stone v. Mississippi, 101 U. S. 814 (1879); Brown Co. v. Feldman, 256 U. S. 170, 41 Sup. Ct. 565 (1921); Manigault v. Springs, 199 U. S. 473, 26 Sup. Ct. 127 (1905); Burke v. Bryant, 283 Pa. 114, 128 Atl. 821 (1925); State v. Mercantile Co., 184 Mo. 160, 82 S. W. 1075 (1904) (act was valid requiring a deposit with state treasurer by a company to protect its members); Daggs v. Insurance Co., 136 Mo. 382, 38 S. W. 85 (1896) (act held valid that prohibits an insurance company from denying that the property insured was worth the value specified in the insurance policy).

[13] Noble State Bank v. Haskell, 219 U. S. 104, 31 Sup. Ct. 186 (1911). Here it was provided that every state bank should pay an assessment to a "depositor's guaranty fund". This was held to be a valid exercise of the police power. Justice Holmes said, at 112, "It may be said in a general way that the police power extends to all great public needs. . . . Among matters of that sort probably few would doubt that both usage and preponderant opinion give their sanction to enforcing the primary conditions of successful commerce. . . . If, then, the legislature of the State thinks that the public welfare requires the measure under consideration, analogy and principle are in favor of the power to enact it. . . . The power to compel, beforehand, coöperation, and, thus it is believed, to make a failure unlikely and a general panic almost impossible, must be recognized . . ."

machinery should not then prove reasonably fit for the purpose for which it was purchased; that any contractual provision to the contrary should be considered against public policy and void. Upon plaintiff's seeking thereunder to avoid a purchase, defendant pleaded that plaintiff had waived all warranties, express, implied or statutory, and opposed his demurrer, on the ground that the statute was in violation of due process. *Held,* that the statute was constitutional. *Advance-Rumely Thresher Co. v. Jackson,* 53 Sup. Ct. 133 (1932).

The unanimous validation of this statute [1] affords an interesting basis for continuing conjecture as to a possible change in the attitude of the Supreme Court, owing to the recent change in its personnel, toward the due process clause as applied to liberty of contract.[2] After a period of rather vague formulation of the limits of state action culminating in a development of considerable liberality,[3] a distinct period of reaction was noticeable following the appointment of a number of justices during the Harding administration.[4] Under the influence of a majority thus constituted there developed an attitude of strict scrutiny toward state legislation interfering with liberty,[5] and, as applied to the regulation of business, a crystallization to the effect that regulation was permissible only when the business sought to be governed was such as to be "affected with public interest".[6] Both the strictness of the view and the "public interest" formulation met with consistent objection from a dissenting minority.[7] Coincident with the most recent changes in the membership of the Court, a first decision was hailed as indicating support by the new justices of the previous minority view.[8] A

[1] The opinion was written by Justice Butler, Justices Stone and Cardozo concurring in the result.

[2] The changes referred to are, particularly, the succession of Chief Justice Hughes and Justice Roberts to the seats of Chief Justice Taft and Justice Sanford.

[3] For a general development of the decisions proceeding from the raising of the due process clause as a bar to legislative interference with contractual freedom, see: Sharp, *Movement in Supreme Court Adjudication* (1933) 46 HARV. L. REV. 361; Anthony, *Attitude of the Supreme Court Toward Liberty of Contract* (1928) 6 TEX. L. REV. 266; Warren, *The New Liberty Under the Fourteenth Amendment* (1926) 39 HARV. L. REV. 431.

[4] Chief Justice White and Justices Pitney, Day and Clarke were succeeded by Chief Justice Taft and Justices Sutherland, Butler and Sanford.

[5] Compare the opinion in Bunting v. Oregon, 243 U. S. 426, 37 Sup. Ct. 435 (1917), in which a state statute limiting the hours of labor for all persons employed in manufacturing establishments was held valid, with that in Adkins v. Children's Hospital, 261 U. S. 525, 43 Sup. Ct. 394 (1923), in which the fixing of wages for women and minors in the District of Columbia was held unconstitutional. See Anthony, *supra* note 3.

[6] The classification of businesses affected with public interest was (roughly) declared in Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522, 43 Sup. Ct. 630 (1923), to extend to government enterprises, public utilities, and an undefined, but strictly to be limited, third class which are "held out" as public by their operators. Under this formulation, transportation, insurance, grain storage, have been held to be, unemployment agencies, baking, ice manufacturing, have been held not to be, affected with public interest. See generally: Note (1932) 30 MICH. L. REV. 1277; Note (1929) 2 So. CALIF. L. REV. 277.

[7] See the criticism of the "public interest" crystallization—a distinct intellectual victory over so artificial a rule—by Justices Holmes and Stone, dissenting, in Tyson & Bro. v. Banton, 273 U. S. 418, 446, 447, 47 Sup. Ct. 426, 434 (1927). An even more complete objection to the attitude of the Court in dealing strictly with any statutory interference with freedom of contract and requiring special justification therefor has been consistently maintained by Justice Brandeis, invoking the doctrine of presumptive constitutionality and requiring to secure invalidation a showing on the basis of social fact that the statute is unreasonable as a means of achieving a public purpose. See his dissent in Burns Baking Co. v. Bryan, 264 U. S. 504, 44 Sup. Ct. 412 (1924). See also Biklé, *Judicial Determination of Fact as Affecting Constitutionality* (1924) 38 HARV. L. REV. 6, and Notes cited, *infra* note 8.

[8] O'Gorman & Young v. Hartford Fire Ins. Co., 282 U. S. 251, 51 Sup. Ct. 130 (1931). A New Jersey statute requiring that all agents of insurance companies in the state should be paid the same rate of commission was held valid. The opinion, by Justice Brandeis, was based squarely on the presumption of constitutionality. See Note (1931) 40 YALE L. J. 657; Note (1931) 5 CIN. L. REV. 218. Justice Brandeis was joined by Chief Justice Hughes and Justices Holmes, Stone and Roberts. Specially dissenting were Justices Van Devanter, McReynolds, Sutherland and Butler.

later case, in which a majority held invalid a statute on the basis of the "public interest" crystallization, somewhat checked such speculation.[9] In the principal decision, however, in spite of its brevity, there is noticeable an absence of mention of the "public interest" requirement and instead an approach from certain early decisions of considerable leniency towards the statutory invalidation of contracts declared "contrary to public policy".[10] It may be observed that the authorities thus cited are all clearly within the bounds of the public interest formulation; that strictly, therefore, they are exceeded by the facts of the instant case.[11] At most, the instant case may be said to fall within a vague recent formulation to the effect that a state may regulate its principal industry.[12] There is, as well, apparent in the case a tendency to uphold the statute where, from an investigation of the factual conditions giving rise to it, the provision could be said to be a reasonable exercise of legislative discretion—an approach long advocated by the minority—and a general tone of liberality proceeding from social approval of the measure.[13] While the decision, because of the unique favor in the eyes of the Court of the interest protected,[14] should not be pressed far, it indicates that there is likely to be a considerable liberalization of the attitude of the Court as a whole towards abridgment of liberty of contract, marked by a desertion of the "public interest" crystallization, apparently no longer really conclusive in the view of a majority. The future basis of the legitimacy of legislation would thus seem to be its social advisability in the eyes of the Court, viewed as a purely factual problem, accompanied by an increasing tendency towards, if not acceptance of, the presumption of constitutionality and the implicit maximum of discretion accorded the legislatures thereby.[15]

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[9] New State Ice Co. v. Liebmann, 285 U. S. 262, 52 Sup. Ct. 371 (1932). An Oklahoma statute requiring, in order to prevent disastrous competition, a state license to enter the ice business was held invalid on the ground that ice manufacturing was not affected with public interest. See Note (1932) 30 MICH. L. REV. 1277. Justices Brandeis and Stone dissented. Justice Cardozo took no part.

[10] See principal case at 135.

[11] In Frisbie v. United States, 157 U. S. 160, 5 Sup. Ct. 589 (1895) a limitation of attorneys' pension fees to ten dollars was sustained on the ground that a pension being purely the creation of Congress, Congress might regulate charges in connection therewith. In Orient Ins. Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281 (1898), Whitfield v. Aetna Life Ins. Co., 205 U. S. 489, 27 Sup. Ct. 578 (1907), and National Union Fire Ins. Co. v. Wanberg, 260 U. S. 71, 43 Sup. Ct. 32 (1922), the regulation was of insurance contracts; in Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821 (1903), of seamen's wage contracts; in Chicago B. & Q. R. Co. v. McGuire, 219 U. S. 549, 31 Sup. Ct. 259 (1911), of employees' injury contracts with railroads.

[12] For this late qualification of the "public interest" restriction, see New State Ice Co. v. Liebmann, *supra* note 9, at 273 *ff.*, 52 Sup. Ct. at 373. Apart from its artificiality, such a qualification would in itself appear a desertion of the "public interest" rule as originally stated. See citations, *supra* note 6.

[13] The greater part of the opinion is concerned with an analysis of the factual reasons making it necessary that complicated farm machinery be tested in the fields to determine its practicability. Such an extra-legal approach approximates that so long advocated by Justice Brandeis, see note 7, *supra*, and which has until recently been found peculiar to the minority.

[14] There is a very apparent and special sympathy with the legislation on the part of the Court proceeding from the economic plight of the farmer. See principal case at 134.

[15] The due process clause in relation to property restrictions has already been reduced to a mere check to be applied where the social purpose of the restriction is not approved by the Court. See Ribble, *The Due Process Clause in Zoning Legislation* (1930) 16 VA. L. REV. 689; (1932) 81 U. OF PA. L. REV. 81. Such an attitude, removing the necessity for restriction to any particular class of regulation, in practical effect necessarily shifts the burden of invalidation by showing social inadvisability to the opponents of the legislation. See notes 7 and 8, *supra*. Moreover, because of the great difficulty of the Court's declaring socially inadvisable a regulation found necessary by the local legislature, it necessarily produces the allowance of considerable discretion to the states. The necessary implications of the view are well made manifest by Justice Brandeis: "The economic and social sciences are largely uncharted seas. . . . Merely to acquire the knowledge essential as a basis for the exercise of this multitude of judgments would be a formidable task. . . . To stay experimentation in things social and economic is a grave responsibility." New State Ice Co. v. Liebmann, *supra* note 9, at 310, 52 Sup. Ct. at 386.

CORPORATIONS—JURISDICTION OF SUIT INVOLVING INTERNAL AFFAIRS OF FOREIGN CORPORATION—Shareholders of a New Jersey corporation approved a "plan" to offer employees an opportunity to subscribe for shares at the par value of $25, the market price being $112.[1] Not having previously revealed their intentions,[2] the directors allotted more than half the issue to themselves. The principal business office of the corporation, and its books and records were in New York. The plaintiff, a New York shareholder, being unsuccessful in his attempt to have the Federal Courts sitting in New York cancel the shares in the hands of certain directors (all but one of whom resided there), appealed to the Supreme Court.[3] *Held* (Justices Stone, Brandeis and Cardozo dissenting), that the bill be dismissed, without prejudice to the plaintiff's right to sue in a court in New Jersey, since the case involved the internal affairs of a foreign corporation. *Rogers v. Guaranty Trust Co. of N. Y. et al.*, 53 Sup. Ct. 295 (1933).

Courts generally say that they will not entertain a suit involving the regulation of the internal affairs of a corporation domiciled in another state.[4] This limitation is not based upon any jurisdictional disability,[5] but rests upon considerations of policy, expediency, justice to the parties, and the ability to render an effective decree.[6] These considerations are largely based upon the following factors: the amount of corporate property owned, and amount of business done within the jurisdiction; the presence within the jurisdiction of the officers and directors, and the books and records of the corporation; and the type of relief demanded.[7] Thus, if the enterprise is really local, a technical foreign domicile will not be a bar to the exercise of jurisdiction over "internal affairs".[8] And where the court is the most competent to grant the relief sought, as where a shareholder seeks to inspect books within the jurisdiction, courts will usually entertain the suit.[9] But jurisdiction will generally be denied where the decree would require close supervision of the details of the corporate business.[10] Usually, courts will take jurisdiction to prevent or rectify the fraudulent misappro-

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[1] The issue was made under N. J. COMP. STAT. (Supp. 1924) p. 697, which required that the board of directors shall formulate a plan for the issue, to be approved by the shareholders. The "plan" approved in the instant case empowered the directors to issue the shares to such employees as the directors should determine.

[2] The only hint of the directors' purpose was the following sentence in the "plan": "No employee or person actively engaged in the conduct of the business of the corporation, or its subsidiaries shall be deemed ineligible to the benefits of the plan by reason of being also a director of the corporation or of any of its subsidiaries or of holding any office therein."

[3] Rogers v. American Tobacco Co., 60 F. (2d) 114 (C. C. A. 2d, 1932), (1932) 81 U. OF PA. L. REV. 220, which dismissed the bill (Swan, J., dissenting) for failure to show fraud.

[4] Babcock v. Farwell, 245 Ill. 14, 91 N. E. 683 (1910); Guilford v. Western Union Telegraph Co., 59 Minn. 332, 61 N. W. 324 (1894); (1922) 18 A. L. R. 1383; (1924) 32 *id.* 1353.

[5] Jurisdiction to determine the validity of a corporate organization, or to annul its charter is vested solely in the state of creation, and a decree of a foreign court to that effect will not be recognized as valid. Hogue v. American S. F. Co., 247 Pa. 12, 92 Atl. 1073 (1914); see Wilkins v. Thorne, 60 Md. 253 (1883).

[6] Wineburgh v. U. S. Steam, *etc.* Co., 173 Mass. 60, 53 N. E. 145 (1899); Weltengel v. Robinson, 288 Pa. 362, 136 Atl. 673 (1927); Corry v. Barre Quarry Co., 91 Vt. 413, 101 Atl. 38 (1917).

[7] See NOTE (1929) 29 COL. L. REV. 968.

[8] Wait v. Kern River Mining Corp., 157 Cal. 16, 106 Pac. 98 (1919); Cunliffe v. Consumers Ass'n of America, 280 Pa. 263, 124 Atl. 501 (1924); CONFLICTS OF LAWS RESTATEMENT (Am. L. Inst., 1930) § 216.

[9] Machen v. Machen *etc.* Co., 237 Pa. 212, 85 Atl. 100 (1912); Klotz v. Pan-American Match Co., 221 Mass. 38, 108 N. E. 764 (1915); Nettles v. McConnell, 151 Ala. 538, 43 So. 838 (1907).

[10] Mulligan's Estate, 274 Pa. 398, 118 Atl. 315 (1922); State *ex rel.* Minn. Mut. Life Ins. Co. v. Denton *et al.*, 229 Mo. 187, 129 S. W. 709 (1910).

priation of property located within the jurisdiction.[11] This assumption of jurisdiction can hardly be called an interference with "internal affairs" where the fraud may be investigated, and the relief granted without detailed supervision of the corporate management. The Supreme Court could have exercised jurisdiction on this ground. Its decree would have been effective since the parties having the shares were before the court. Since the integrity of the modern corporation with widely-scattered ownership and nation-wide business activities should be strictly guarded, the failure of the court promptly to investigate fraud is unfortunate.[12]

EQUITY—TRANSFER OF IDEA FOR A PATENT IN FRAUD OF CREDITORS AS GIVING RISE TO A CONSTRUCTIVE TRUST—*A,* the inventor of a collapsible bed spring, became insolvent, and shortly thereafter his son, the defendant, applied for and secured a patent on the invention. Defendant then sold the patent to a corporation, in which sale *A* joined at the request of the purchaser, and the proceeds were invested by defendant in certain real estate, upon which *A* took up his residence. Plaintiff, trustee in bankruptcy of *A,* now seeks to charge defendant as trustee of the patent and the proceeds derived therefrom. *Held,* that *A's* idea, not being property, could not be the subject of a trust, and that the patent being issued to a person other than the inventor, was void, and hence incapable of being impressed with a trust.[1] *Hise v. Grasty,* 166 S. E. 567 (Va. 1932).

It has been held that an unpatented invention is not such an asset as will pass to a trustee in bankruptcy,[2] but even before an application for a patent is made an invention may be sold,[3] and an inventor will be protected against one who attempts to use his idea.[4] Once the application for a patent is filed, creditors may reach any profits arising from the sale or use of the invention,[5] yet in-

[11] Babcock v. Farwell, *supra* note 4; Miller v. Quincy, 179 N. Y. 294, 72 N. E. 116 (1904); Tasler v. Peerless Tire Co., 144 Minn. 150, 174 N. W. 731 (1919); Richardson v. Clinton Wall Mf'g Co., 181 Mass. 580, 64 N. E. 400 (1902). In Kelley v. Thomas, 234 Pa. 419, 83 Atl. 307 (1912) the court refused jurisdiction to compel an accounting by officers for misappropriated property, but there the corporation had no property, and did not conduct its business within the jurisdiction.

It has been held that a court may entertain a suit to compel the cancellation or issuance of shares by a foregin corporation. Backus v. Finkelstein, 23 F. (2d) 357 (D. Minn. 1927); Babcock v. Schuylkill & L. V. Ry. Co., 56 Hun 649, 9 N. Y. Supp. 845 (1890); Wait v. Kern River Mining Corp., *supra* note 7; see Guilford v. Western Union Tel. Co., *supra* note 4. *Contra:* Boyette v. Preston Motors Corp., 206 Ala. 240, 89 So. 746 (1921).

[12] The majority opinion based its refusal of jurisdiction in part upon the ground that the case involved a novel and difficult question of New Jersey statute law. But it is the duty of the federal courts to decide such questions in cases over which they have jurisdiction. Silver v. L. & N. R. Co., 213 U. S. 175, 29 Sup. Ct. 451 (1909); Risty v. C., R. I. & P. Ry. Co., 270 U. S. 378, 46 Sup. Ct. 236 (1929). Justice Cardozo, dissenting, says (at 305), "The overmastering necessity of rebuking fraud or breach of trust will outweigh competing policies and shift the balance of convenience." Justice Stone, dissenting, pertinently points out (at 304) that if the suit were begun in or removed to a federal court in New Jersey, and appealed to the Supreme Court, the same question of New Jersey law would have to be decided.

[1] The original inventor must apply for the patent, or join in the application if it is made by his assignee. Kennedy v. Hazleton, 128 U. S. 667, 9 Sup. Ct. 202 (1888).

[2] Rosenthal v. Goldstein, 112 Misc. 606, 183 N. Y. Supp. 582 (1920), and thereon Note (1920) 69 U. OF PA. L. REV. 65. *Cf. In re* Keene, [1922] 2 Ch. 475, and thereon Note (1923) 8 CORN. L. Q. 174.

[3] Ullman v. Thompson, 57 Ind. App. 126, 106 N. E. 611 (1914).

[4] Peabody v. Norfolk, 98 Mass. 452 (1868); Tabor v. Hoffman, 118 N. Y. 30, 23 N. E. 12 (1889) (proceeding on the theory that to allow such use would be to permit unfair competition).

[5] *In re* Cantelo Mfg. Co., 185 Fed. 276 (D. Me. 1911); *In re* Myers-Wolf Mfg. Co., 205 Fed. 289 (C. C. A. 3d, 1913).

sofar as patent rights are contract rights,[6] and since the contract does not come into existence until the government grants the patent, it is obvious that until the patent is issued the inventor has no better right than he had before making his application. Further, the difference between an unpatented invention and a trade secret is so slight that at times the two are almost indistinguishable,[7] and what difference there is is in degree only, not in principle. Yet the latter may be the *res* of a trust,[8] it will pass to a trustee in bankruptcy,[9] and injunctions will be granted to prevent its improper disclosure.[10] The distinction between the two classes of cases is artificial and ill-conceived, and the court in the instant case could have achieved more substantial justice as between the parties had it refused to recognize it.[11] It is suggested, first, that there is no reason why such an idea as this cannot be regarded as property which might form the *res* of a trust,[12] and second, that although unwilling to include ideas in its definition of property, the court could have reached a more desirable result in this case had it regarded the idea as a trade secret, inasmuch as *A's* idea is now being used by the purchasing corporation in manufacturing these articles, and held the defendant as trustee of the proceeds derived from the sale of a trade secret.[13]

HUSBAND AND WIFE—RIGHT OF WIFE OF EMPLOYER TO RECOVER AS A BENEFICIARY UNDER THE WORKMEN'S COMPENSATION ACT FOR THE DEATH OF HER SON—A wife, dependent wholly on her son for support, sued her husband as employer of the son for the latter's death under the *Workmen's Compensa-*

[6] National Hollow Brake-Beam Co. v. Interchangeable Brake-Beam Co., 106 Fed. 693, 701 (C. C. A. 8th, 1901).

[7] Compare Burnell v. Chown, 69 Fed. 993 (N. D. Ohio 1895) with Montegut v. Hickson, 178 App. Div. 94, 164 N. Y. Supp. 858 (1917).

[8] Green v. Folgham, 1 Sim. & St. 398 (Eng. 1823), where the defendant was held as trustee of the secret recipe of an ointment, which had been used for years as part of a business.

[9] *In re* Keene, *supra* note 2.

[10] In granting such injunctions courts carefully endeavour to avoid giving the impression that they are protecting a property interest. "The word property as applied to trade marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith." Holmes, J., in DuPont Powder Co. v. Masland, 244 U. S. 100, 102, 37 Sup. Ct. 575, 576 (1917). But the primary fact is that the court is protecting something of value which the plaintiff has the right to use or possess, and whether it is called property or not should make little difference. No court has yet called this interest property, although some have nearly done so. International News Service v. Associated Press, 248 U. S. 215, 39 Sup. Ct. 68 (1918) (Justices Brandeis and Holmes dissenting); New Jersey State Dental Society v. Dentacura Co., 57 N. J. Eq. 593, 41 Atl. 672 (1898). In the great majority of cases the courts will say that they are protecting the individual from a breach of confidence or from unfair competition. DuPont Powder Co. v. Masland, *supra;* Tilly & Co. v. Warner & Co., 275 Fed. 752 (C. C. A. 3rd, 1921); Empire Steam Laundry Co. v. Lozier, 165 Cal. 95, 130 Pac. 1180 (1913). The most interesting of these cases, and the one in which it is most difficult to define the interest protected is Fisher v. Star Co., 231 N. Y. 414, 132 N. E. 133 (1921).

[11] The distinction is simply that in the case of trade secrets the formula, invention, customer list or code has been in use for a long time in an established business, whereas an idea such as that in the instant case has not yet been put to any practical use. It is perfectly possible that this distinction may at times be valid, but its application in the instant case is questionable, since the inquiry goes only to the practicability of the scheme, and here the practicability of the inventor's device is apparent from the record.

[12] The cases cited by the court in the instant case in support of its proposition that this idea cannot be property do not, in fact, sustain it. Bristol v. Equitable Life Assurance Ass'n, 132 N. Y. 264, 30 N. E. 506 (1892); Stein v. Morris, 120 Va. 390, 91 S. E. 177 (1917). To the same effect is Haskins v. Ryan, 71 N. J. Eq. 575, 64 Atl. 436 (1906). Each of these cases holds simply that under the particular circumstances present therein, the idea is not deserving of protection. But the Bristol case carefully avoids saying that under the proper conditions an idea may not be regarded as property. 132 N. Y. at 267, 30 N. E. at 507. See in this connection Fisher v. Cushman, 103 Fed. 860, 866 (C. C. A. 1st, 1900).

[13] The case would then have fallen within the rule laid down in Green v. Folgham, *supra* note 8.

tion Act. It was contended by the defense that "no statute provides that the wife may sue her husband in tort actions or for any statutory liability." [1] *Held,* that there was an implied contractual liability and that the wife could recover.[2] *Keller v. Industrial Commission,* 183 N. E. 237 (Ill. 1932).

The judicial interpretations of the married women's separate property acts have resulted in a marked conflict as to whether these statutes are to be construed as completely abrogating the common law theory of marital unity or whether they are to be considered as merely creating exceptions to that concept.[3] The minority of jurisdictions in following the former view have construed the statutes liberally and permit suits by the wife against the husband even in tort actions.[4] The majority, however, while extending the statutes to permit a contract action [5] by the wife against the husband, have refused to recognize such right as existing in tort.[6] The defendant in the instant case pleaded that the Illinois statute did not provide that a wife might sue her husband in tort *or for any statutory liability.* This defense would be held by the minority, of course, to be insufficient and no such difficulty as exists in the instant case would arise. The court, however, having refused with the majority to permit a tort action

[1] At 240.

[2] The court appears inconsistent in its opinion. After holding that the right given by the Workmen's Compensation Act is not a right enforceable at law or equity but in a separate tribunal, it goes on to enunciate the quasi-contractual theory, which leads to the conclusion that the court considered that there *are* some rights under the act enforceable in law, otherwise they could not be contractual.

[3] Even among states where the statutes are surprisingly similar, precisely the opposite conclusions have been reached. Compare the following statutes: ALA. CODE (Michie, 1928) § 8268; CONN. GEN. STAT. (1930) § 5154; ILL. REV. STAT. (Cahill, 1931) c. 68, § 1; ME. REV. STAT. (1930) c. 74, § 5; N. Y. DOM. REL. LAW (1916) § 57. There is no direct provision in any of these statutes for a personal tort action between husband and wife. A wife may not sue her husband in tort: Libby v. Berry, 74 Me. 286 (1883); Acherson v. Kibler, 138 Misc. 695, 246 N. Y. Supp. 580 (1930). *Contra:* Johnson v. Johnson, 201 Ala. 41, 77 So. 335 (1917); Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914). See Note (1927) 30 LAW NOTES 165.

There is also the question of whether the old common law disability was a matter of procedure or substance. If it was one of procedure then there should be little difficulty in interpreting the statutes as completely superseding the old law, and yet New York, while refusing to allow a wife to sue the husband for a personal tort intimates that the question is one of procedure only. See Schubert v. August Schubert Wagon Co., 249 N. Y. 253, 164 N. E. 42 (1928), where the court sustained an action by the wife against the employer of her husband for a personal injury to the wife by the husband while in the scope of his employment. As a third party cannot sue a principal for the negligence of his agent if the latter is not also liable, it may be inferred that the court considered an action for a personal tort between husband and wife to be merely a matter of procedure. See also (1932) 80 U. OF PA. L. REV. 1027.

[4] Johnson v. Johnson, *supra* note 2, at 43, 77 So. at 337: ". . . these sections . . . have the effect of abrogating the fiction of legal identity, and seem thereby, except as otherwise prescribed, to destroy the foundation of the common law in its application to questions touching the rights of husband and wife *inter se.*" See also Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832 (1916). See McCurdy, *Torts Between Persons in Domestic Relation* (1930) 43 HARV. L. REV. 1030.

[5] Hendrickson v. Hendrickson, 198 Ill. App. 442 (1916); Miller Watt & Co. v. Mercer, 170 Iowa 166, 150 N. W. 694 (1915).

[6] Heyman v. Heyman, 19 Ga. App. 634, 92 S. E. 25 (1917); Libby v. Berry, *supra* note 3. The majority of courts are inclined to restrict the statutes in personal tort actions between the married parties because of public policy; that such actions tend to disrupt the marital union. This theory, however, is clearly superficial when it is considered (1) that most of these actions involve an insurance company (see the principal case at 241), (2) that a wife may prosecute her husband, and (3) that a wife may sue her husband in a tort action for a property right (Smith v. Smith, 20 R. I. 556, 40 Atl. 417 (1898)). It is interesting to note that one of the minority courts has based its decision in allowing recovery in personal tort actions on the theory that there is a property interest of the wife within the meaning of the statute in her own body, and that any injury to it gives rise to an action even against the husband. Prosser v. Prosser, 114 S. C. 45, 102 S. E. 78 (1919).

by the wife against the husband,[7] found it necessary in order to carry out the evident purposes of the Workmen's Compensation Act, to interpret the latter statute as raising an implied contractual right rather than a tort duty. It is difficult however, to discover either a contractual or a tort concept in the Act. If there is a breach of duty under the Act it is not because of the injury to the employee but rather because of a failure to compensate for it,[8] which creates a liability in no sense tortious. And where, as in Illinois, the Act is compulsory[9] and the power of enforcement lies in the state and not in the employee, it is doubtful whether any elements of a contractual nature[10] exist in the relationship.[11] In view of the peculiar manner of suing for compensation in a tribunal distinct and separate from the law and equity courts, it is probable that the liability raised is purely statutory, involving neither contractual nor tort rights, and as Illinois has apparently adopted the theory that the common law is not abrogated by the married women's acts, it appears that the court has made an unwarranted extension[12] of the contract sections of these statutes. The decision, in view of the purposes of the Workmen's Compensation Act, is undoubtedly sound but the court overlooked an opportunity to abolish completely the outworn theory of the old law that the husband and wife are one.[13]

INSURANCE—VOLUNTARY ACT AS ACCIDENTAL MEANS—DEATH BY CARBON MONOXIDE GAS—Plaintiff sued on the double indemnity clause of a life insurance policy after the decedent was found dead in his garage behind the steering wheel of his automobile. He had evidently been repairing the engine. The

[7] Main v. Main, 46 Ill. App. 106 (1892).

[8] Holland v. Morley Button Co., 83 N. H. 482, 484, 145 Atl. 142, 144 (1929): "Breach of duty does not lie in the injury done but in the failing to compensate for it. . . . The statute applied to torts as violations of legal rights which are not contractual in nature, and a liability not resulting from a tort and being only a liability to pay money, is in no way a liability for tort."

[9] ILL. REV. STAT. (Cahill, 1931) c. 48, § 202.

[10] Val Blatz Brewing Co. v. Gerard, 201 Wis. 474, 478, 230 N. W. 622, 624 (1930): "Liability under the Workmen's Compensation Act is, strictly speaking neither tortious nor contractual in its nature. It is an obligation imposed by law which arises out of the status created by the employment. The liability arises out of the law itself, rather than out of the contract of the parties. . . . The relationship of employer and employee has its origin in the contract of employment; but when that relationship is created by the contract, the respective rights and liabilities with reference to the compensation are dependent upon the provisions of the law, not upon the contract of the parties."

See also Ocean Accident & Guar. Co. v. Industrial Commission, 32 Ariz. 275, 283, 257 Pac. 644, 646 (1927): "We, therefore hold that the present Arizona Workmen's Compensation Act is neither elective nor contractual in its nature, but on the contrary, that it rests upon the police power *to regulate the status of employer and employee within the State of Arizona.* . . ." But *cf.* Nordmark v. Indian Queen Hotel, 104 Pa. Super. 139, 159 Atl. 200 (1932).

[11] The court in endeavoring to discover an existent contractual relation, drew the analogy of the implied contractual right raised by a passenger-carrier relation. But the error in this analogy is that such implied contract initiates a duty which the passenger sues on in *tort* if injured; the contract raises the duty but does not determine the action.

[12] By molding its opinion to a treatment of the purposes of the Workmen's Compensation Act and its application to all circumstances regardless of inconsistencies raised by the common law, the court would not have found it necessary to make such a broad extension of the contract section of the married women's statute and would thereby have escaped any confusion that may arise under the decision. The court could also have avoided the husband and wife difficulty by holding that as the action when appealed from the compensation board is brought in name at least against that body, rather than against the employee, that there is no question of an action between the married parties.

[13] In England and Connecticut the problem in the instant case would not arise as the Compensation Statutes in those jurisdictions expressly provide that the term "workmen" as used therein shall not include a member of the employer's family dwelling in his home. Marks v. Carne, [1909] 2 K. B. 516; McNamara v. McNamara, 91 Conn. 380, 100 Atl. 31 (1917).

garage was smoky and the engine warm though not running, the ignition being turned on but the gas tank empty. The exhaust pipe faced an open door. The jury found that death was caused by carbon monoxide gas discharged by the engine. It refused to find suicide. *Held,* that the plaintiff should recover since the injury resulted from "external, violent and accidental means" under the terms of the policy. *Urian v. Equitable Life Assurance Society,* Pa. Sup. Ct., decided January 3, 1933.

It is generally stated that death which is caused by the involuntary inhalation of noxious gases is caused by external, violent and accidental means".[1] In its result, therefore, the instant case is in accord with the weight of authority, but on its facts it marks an extension of the rule for, with few exceptions,[2] the agency which has caused the presence of the gas has not been the insured or has been some involuntary or negligent act on his part.[3] Here it was the intentional, voluntary act of the decedent which created the gaseous condition.[4] Some courts hold that, although the insured intended the act, he did not intend it in such a way as to cause his death or injury, and therefore such deaths are caused by accidental means.[5] In view of the fact that before recovery can be allowed under such policies it is necessary not only that the *result* but also that the *means* be found to be accidental, such holdings are typical of the tendency to construe the policy in favor of the insured. Other courts, of which Pennsylvania is one,[6] reason that since the insured intended the act which resulted in the injury, the cause, being the intended act, could not be accidental.[7] In the principal case the

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[1] 5 COUCH, CYCLOPEDIA OF INSURANCE LAW (1929) § 1150; CORNELIUS, ACCIDENTAL MEANS (1932) 76. The degree of violence is immaterial. Aetna Life Insurance Co. v. Fitzgerald, 165 Ind. 317, 75 N. E. 262 (1905). If either of two causes might have resulted in the death, recovery is denied. Carnes v. Iowa S. T. M. Ass'n, 106 Iowa 281, 76 N. W. 683 (1898).

[2] Wiger v. Mutual Life Ins. Co., 205 Wis. 95, 236 N. W. 534 (1931). The facts in this case were substantially the same as those of the instant case. Recovery was allowed but in terms which leave one in doubt whether the court realized the difference between the accidental means requisite for recovery and the accidental result. At 103, 236 N. W. at 538: "If the resulting injury . . . was 'caused or produced without design', it falls directly within the letter and spirit of the . . . [clause accidental means]."

[3] Paul v. Travelers' Ins. Co., 112 N. Y. 472, 20 N. E. 347 (1889); Metropolitan Life Ins. Co. v. Broyer, 20 F. (2d) 818 (C. C. A. 9th, 1927); Cantrall v. Great Am. Cas. Co., 256 Ill. App. 47 (1930); Miller v. Inter-Ocean Cas. Co., 110 W. Va. 494, 158 S. E. 706 (1931); Canal-Commercial T. & S. Bank v. Employers' Liability Assur. Corp., 155 La. 720, 99 So. 542 (1924); Pickett v. Insurance Co., 144 Pa. 79, 22 Atl. 871 (1891).

[4] The rule is that the negligence of the insured will not preclude a finding of accidental means. Biehl v. General Acc. Ass. Corp., 38 Pa. Super. 110 (1909); Champlin v. Railway Pass. Assur. Co., 6 Lans. 71 (N. Y. 1872); Aetna Life Ins. Co. v. Little, 146 Ark. 70, 225 S. W. 298 (1920). "An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means." Western Comm. Trav. Ass'n v. Smith, 85 Fed. 401, 405 (C. C. A. 8th, 1898). Nor will the fact that the insured was doing an illegal act preclude recovery when the injury is caused by accidental means. Zurich Gen. Acc. and L. Co. v. Flickinger, 33 F. (2d) 853 (C. C. A. 8th, 1929); Note (1929) 16 VA. L. REV. 64.

[5] Yates v. Int'l Trav. Ass'n, 16 S. W. (2d) 301 (Tex. 1929); Johnson v. Fidelity and Cas. Co., 184 Mich. 406, 151 N. W. 593 (1915); Standard Life and Acc. Ins. Co. v. Schmaltz, 66 Ark. 588, 53 S. W. 49 (1899); Horsfall v. Pacific Mutual Life Ins. Co., 32 Wash. 132, 72 Pac. 1028 (1903); Bryant v. Continental Casualty Co., 107 Tex. 582, 182 S. W. 673 (1916).

[6] Hesse v. Travelers' Ins. Co., 299 Pa. 125, 149 Atl. 96 (1930); Trau v. Preferred Acc. Ins. Corp., 98 Pa. Super. 89 (1929); Semancik v. Continental Cas. Co., 56 Pa. Super. 392 (1914).

[7] Continental Cas. Co. v. Pittman, 145 Ga. 641, 89 S. E. 716 (1916); Wayne v. Travelers' Ins. Co., 220 Ill. App. 493 (1921); Barnstead v. Commercial Trav. Mut. Acc. Ass'n, 204 App. Div. 473, 198 N. Y. Supp. 416 (1923); Paist v. Aetna Life Ins. Co., 54 F. (2d) 393 (C. C. A. 3d, 1932); (1932) 80 U. OF PA. L. REV. 600; Note (1930) 78 U. OF PA. L. REV. 762. All courts agree that to slip while doing an intentional act is an accidental cause of injury or death. Kelley v. Pittsburgh Cas. Co., 256 Pa. 1, 100 Atl. 494 (1917).

court argued that, the breathing of the gas being involuntary, the cause of the death was accidental.[8] However, this seems to be an extreme refinement when it is remembered that the insured, when he started the engine and produced the gas, must have known that to live it would be necessary for him to breathe. Other courts in similar situations have *allowed* recovery by *not recognizing* such refinements.[9] The court may have felt that its previous rule had been too harsh to extend to other situations or that uniformity in gas cases is desirable. While the decision in this case may be a commendable one it will not be likely to clarify the confusion now existing in this field of the law.

MORTGAGES—SURETYSHIP—DISCHARGE OF MORTGAGOR BY EXTENSION AGREEMENT BETWEEN HIS GRANTEE AND THE MORTGAGEE—Defendants, the makers of a note secured by a mortgage on real estate, conveyed the property subject to the mortgage, the grantee not personally assuming the debt. Without the defendant's knowledge or consent, the mortgagee, by a valid contract with the grantee, extended the time for the payment of the mortgage debt. After default, the mortgagee sued in equity to foreclose the mortgage and to get a personal judgment against the defendants on the note. *Held,* that the mortgagor was released from liability to the extent of the value of the premises at the time of the extension agreement.[1] *Mutual Ben. Life Ins. Co. v. Lindley et al.,* 183 N. E. 127 (Ind. App. 1932).

Where the grantee personally assumes the mortgage debt, a "suretyship" relation is created between the mortgagor and the grantee, the latter becoming the principal debtor.[2] As in ordinary suretyship relations, the mortgagor has the right, on paying the debt at maturity, to be subrogated to the mortgagee's right against the principal debtor.[3] The mortgagee, by extending time to the grantee without the consent of the mortgagor, deprives him of his right to sue the grantee until the end of the extension period and therefore most courts hold that the mortgagor is released from personal responsibility.[4] A few jurisdictions hold that the mortgagor is not released, the theory generally being that the mortgagee is not bound by the suretyship relation between the mortgagor and the

[8] The most widely repeated test used to determine accidental means is that, ". . . If, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means." United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100, 121, 9 Sup. Ct. 755, 762 (1899); Carnes v. Iowa State Trav. Men's Ass'n, *supra* note 1.

[9] Lewis v. Ocean Acc. and Guar. Corp., 224 N. Y. 18, 120 N. E. 56 (1918). Here the insured's death was caused by pricking a pimple on his lip which was followed by infection. The court refused to view the circumstances scientifically by saying that there was nothing accidental in the way the germs entered the body and the way the blood carried the infection but said at 21, 120 N. E. at 57, that the average man would say that the "dire result . . . [was] tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary, an unlooked-for mishap, and so an accident." *Cf.* Prudential Ins. Co. v. Herndon, 40 Ga. App. 692, 151 S. E. 399 (1929); (1930) 28 MICH. L. REV. 1059.

[1] The court sustained a demurrer to the complaint which failed to state the value of the land at the time of the extension agreement and therefore state no cause of action, for if the value of the land exceeded the amount of the debt, there was no right to a personal judgment.

[2] Heidahl v. Geiser Mfg. Co., 112 Minn. 319, 127 N. W. 1050 (1910); Winans v. Hare, 46 Okla. 741, 148 Pac. 1052 (1915); 2 JONES, MORTGAGES (8th ed. 1928) § 920. The relationship is not a true suretyship, for the creditor has not agreed to regard the grantee as the principal debtor. See Note (1902) 15 HARV. L. REV. 398.

[3] 1 BRANDT, SURETYSHIP & GUARANTY (3d ed. 1905) § 333.

[4] Herd v. Tuohy, 133 Cal. 55, 65 Pac. 139 (1901); Union Stove & Machine Works v. Caswell, 48 Kan. 689, 29 Pac. 1072 (1892); Calvo v. Davies, 73 N. Y. 211 (1878); 3 TIFFANY, REAL PROPERTY (2d ed. 1920) 2504.

grantee, and may treat both as principals severally liable.[5] Where the conveyance is merely subject to the mortgage, as in the principal case, the better and majority view is that the land is subject to a primary liability for the debt, and a quasi-suretyship relation exists to the extent of the value of the land, and to that extent the "surety" is released by the extension agreement.[6] A minority of courts hold that the mortgagor is not released.[7] In the instant case, the complainant contended that the *Negotiable Instruments Act* governed and that the defendants were persons primarily liable on the note which had not been discharged by any of the methods enumerated in section 119 of the Act. The court briefly dismissed the contention, saying that the case was controlled by equitable principles.[8] The weight of authority is that suretyship defenses are not available under the *Negotiable Instruments Act*,[9] thus supporting the complainant's position. However, a sounder view, supported by many eminent writers, seems to be that such defenses are available either because the situation is covered by Section 119 (4), "A negotiable instrument is discharged . . . by any other act which will discharge a simple contract for the payment of money", or because this situation is an omitted case and therefore to be governed by the law merchant under Section 196.[10] In the light of these authorities the result in the instant case appears sound from any point of view.

RECEIVERS—FRAUDULENT CONVEYANCES—RIGHT OF INDIVIDUAL DEBTOR TO HAVE RECEIVER APPOINTED TO TAKE OVER ASSETS—A Philadelphia lumber dealer desired time to liquidate assets and prevent a forced sale of his business. A "friendly" receivership seemed a likely device, but neither the Pennsylvania

[5] Corbett v. Waterman, 11 Iowa 86 (1860); Dennison University v. Manning, 65 Ohio St. 138, 61 N. E. 706 (1901); *cf.* Willock's Estate, 58 Pa. Super. 159 (1914). It has been suggested that this view is proper in those jurisdictions where the mortgagee may sue the grantee only in equity, upon the theory that he is subrogated to the rights of the mortgagor, in order to avoid circuity of action, since on that theory there is no legal liability owed by the grantee to the mortgagee, such as is necessary to make him a principal debtor; and that the suretyship doctrine is applicable in jurisdictions where the mortgagee can sue the grantee at law on the doctrine of third party beneficiary. Note (1913) 13 COL. L. REV. 238.

[6] Travers v. Dorr, 60 Minn. 173, 62 N. W. 629 (1895); Murray v. Marshall, 94 N. Y. 611 (1884); Bunnell v. Carter, 14 Utah 100, 46 Pac. 755 (1896).

[7] See Scholten v. Barber, 217 Ill. 148, 75 N. E. 460 (1905); Chilton v. Maryland, 72 Md. 554, 20 Atl. 125 (1890); *cf.* Gorenburg v. Hunt, 107 N. J. Eq. 582, 153 Atl. 587 (1931). In those jurisdictions where the extension does not discharge the mortgagor in case the grantee assumes payment of the indebtedness, it seems *a fortiori* that if the grantee did not assume payment, the mortgagor would not be discharged. In Brawn v. Crew, 183 Cal. 728, 192 Pac. 531 (1920), it was held that the mortgagor was released entirely.

[8] For a similar holding, see N. Y. Stove Merc. Co. v. Gorham, 178 Ky. 535, 199 S. W. 64 (1917).

[9] Peter v. Finzer, 116 Neb. 380, 217 N. W. 612 (1928), (1928) 6 NEB. L. BULL. 417; Vernon Center State Bank v. Mangelsen, 166 Minn. 472, 208 N. W. 186 (1926); (1927) 48 A. L. R. 715; (1930) 65 *id.* 1425, and cases there cited. *Contra:* Smith v. Blackford, 56 S. D. 360, 228 N. W. 466 (1929), (1930) 28 MICH. L. REV. 930. It has been argued that since an extension of time is mentioned in § 120 as a means of discharging persons secondarily liable on the face of the instrument, and is not included for those "primarily liable", the legislative intent was not to permit discharge of the latter in this manner. Union Trust Co. v. McGinty, 212 Mass. 205, 98 N. E. 679 (1912). It seems clear that under § 57, suretyship defenses are not available against a holder in due course who did not know of the suretyship at the time he granted an extension.

[10] BRANNAN, NEGOTIABLE INSTRUMENTS LAW (5th ed. 1932) 884; Raymond, *Suretyship at "Law Merchant"* (1916) 30 HARV. L. REV. 141. But see CRAWFORD, THE NEGOTIABLE INSTRUMENTS LAW (4th ed. 1916) 200. Some courts reach the conclusion that the law merchant governs by invoking § 58, "In the hands of any holder other than a holder in due course, a negotiable instrument is subject to the same defenses as if it were non-negotiable." Fullerton Lumber Co. v. Snoufler, 139 Iowa 176, 117 N. W. 50 (1908).

or federal equity courts entertained such actions to conserve the assets of individual debtors.[1] The lumber dealer therefore formed a Delaware corporation, transferred all his property to it, and secured the appointment of a federal receiver for it. One of the dealers' creditors obtained a Pennsylvania judgment against him and petitioned the federal court for permission to levy on the property in the receiver's custody. *Held,* that the transfer to the corporation was fraudulent, and that petitioner was entitled to levy. *Shapiro v. Wilgus, et al.,* 53 Sup. Ct. 142 (1932).[2]

By Pennsylvania statute law[3] a transfer of property with intent to delay creditors is fraudulent and voidable. Since this was the admitted purpose of the corporate scheme, this element of fraud is a convenient peg on which to hang the decision. Of more universal significance is the intimation by the court that even in the absence of the statute law the receivership was improper and subject to successful attack by the creditor.[4] All the facts in the instant case indicate that the debtor was the prime motivator and sought the receivership to weather a financial storm. This represents an attempted diversion of the "friendly" receivership device from its original function of affording aid primarily to creditors to a depression remedy for debtors, which the court refused to sanction. Now no one denies the economic advisability of carrying over temporarily embarrassed debtors, so that the wisdom of the court's refusal must be based upon the existence of other adequate remedies which obviate the need of equitable intervention. There are a variety of methods for the debtor to meet the situation. Very often without legal aid he can arrange a voluntary agreement among his creditors. If such an arrangement fails the debtor can always go into voluntary bankruptcy.[6] Thereafter if he can convince the court and a majority of his creditors in number and amount of the advisability of a reorganization plan he will be permitted to carry it into effect and ransom his property.[7] When it is desirable the referee or trustee in bankruptcy is also permitted to carry on a business for a limited period.[8] Another possible approach is by assignment for benefit of creditors under state law.[9] Admittedly this method is of slight utility

[1] Hogsett v. Thompson, 258 Pa. 85, 101 Atl. 941 (1917); Davis v. Hayden, 238 Fed. 734 (C. C. A. 4th, 1916). There seems no sound basis for distinguishing between the appointment of a receiver for a corporation and an individual. See Clark, *Simple Contract Creditor Securing Appointment of Receiver* (1927) 1 CIN. L. REV. 388, 401. Admittedly in the case of a large corporation there is greater need for the receivership remedy but this would not support the apparently arbitrary limitation. An interesting attempt has been made to justify the distinction on an historical basis, Glenn, *The Basis of the Federal Receivership* (1925) 25 COL. L. REV. 434.

[2] The lower court opinion is reported in 55 F. (2d) 234 (C. C. A. 3d, 1931).

[3] This was Pennsylvania Law under the statute 13 Elizabeth ch. 5, Rob. Dig. 295, and continues to be such under the Uniform Fraudulent Conveyancing Act which has been adopted in Pennsylvania. PA. STAT. ANN. (Purdon, 1930) tit. 39, § 357. The mere transfer of assets by an individual to a corporation would not in itself seem fraudulent, but here it was accompanied by an intent to obtain a receiver and delay creditors. *Cf.* (1933) 31 MICH. L. REV. 437, 438. It is interesting to note in this connection that another creditor tried to set aside the transfer as void under the Uniform Bulk Sales Act and was unsuccessful. McLean v. Miller Robinson Co., 55 F. (2d) 232 (E. D. Pa. 1931).

[4] *Cf.* Russell v. East Anglian Ry., 3 Mac. & G. 104, 125 (1850); Gooch v. Haworth, 3 Beav. 428 (1841); 1 CLARK, RECEIVERS (2d ed. 1929) 226.

[6] The "friendly" receivership is also called a "consent" receivership since it is a frequent requirement that the debtor must assent to the action. It is a receivership at the instance of a simple contract creditor who, even though the debtor has tangible assets subject to levy, has for some other reason no adequate remedy at law. 1 CLARK, RECEIVERS (2d ed. 1929) 214 *et seq.*

[6] BANKRUPTCY ACT § 4 (a), 30 STAT. 547 (1898), as amended June 25, 1910, 36 STAT. 839 (1910), 11 U. S. C. § 22 (1928). Contrary to common assumption insolvency is not a requisite to the use of the remedy. 1 REMINGTON, BANKRUPTCY (3d ed. 1923) §§ 48, 49.

[7] BANKRUPTCY ACT § 12, 30 STAT. 549 (1898), as amended June 25, 1910, 36 STAT. 839 (1910), 11 U. S. C. § 30 (1928).

[8] BANKRUPTCY ACT § 2 (5), 30 STAT. 545 (1898), as amended June 25, 1910, 36 STAT. 838 (1910), 11 U. S. C. § 30 (1928).

[9] The subject is well treated in Note (1932) 41 YALE L. J. 1056.

per se and usually is but a step toward bankruptcy.[10] Even so, the debtor in theory is amply protected. The chief argument for the extension of equity jurisdiction is the practical one that the debtor's remedies, in the main, lie in bankruptcy, the great expense of which largely precludes its use.[11] While there is some merit in this contention, the prospect of an improvement in the bankruptcy law in the near future would seem to make it unfeasible for equity to intervene in the field, only thereafter to find itself stripped of any legitimate function to perform.

SALES—FRAUD—RIGHT OF CREDITOR OF VENDOR TO ATTACH GOODS SOLD WHERE CHANGE OF POSSESSION FOLLOWING TRANSFER OF TITLE IS NOT SUBSTANTIAL—The *X* agency sold an automobile to plaintiff, its attorney. The certificate of title was assigned in the presence of a notary. Thereafter, the car was kept in the same public garage as before the sale, the account of storage being transferred to the plaintiff's name. Both the general manager of the agency and the plaintiff kept keys to the car, and the general manager was commissioned by the plaintiff to demonstrate it to prospective purchasers. Plaintiff did not obtain a certificate of title in his own name until after the defendants, creditors of the agency, had levied upon the car. *Held,* that the attachment was good: the change in possession, following sale, not being sufficiently substantial to make the transfer of title valid against creditors of the agency. *Menamin v. Automobile Banking Corporation,* 163 Atl. 53 (Pa. Super. 1932).

There is a diversity of authority as to the legal consequences which ensue when the vendee allows the subject-matter of a sale to remain under the control of the vendor, and the vendor's creditors subsequently attach.[1] While the majority [2] of the courts hold that the presumption of fraud against creditors arising under such a situation may be rebutted by evidence of good faith [3] and the payment of adequate consideration,[4] Pennsylvania, with the minority, holds such presumption conclusive.[5] To make a sale valid against existing [6] creditors [7] of

[10] The difficulty with the assignment for benefit of creditors is that it is an act of bankruptcy and a creditor dissatisfied with a voluntary agreement will also be dissatisfied with the assignment since the assignee is usually a party friendly to the assignor and will force bankruptcy, *supra* note 9.

[11] This has been one of the chief criticisms of the present law. See Ganer, *On Comparing "Friendly Adjustment" and Bankruptcy* (1930) 16 CORN. L. Q. 35, 65.

[1] Section Twenty-six of the UNIFORM SALES ACT provides that "where a person having sold goods continues in possession of the goods . . . and such retention of possession is fraudulent in fact or is deemed fraudulent under any rule of law, a creditor or creditors of the seller may treat the sale as void". 1 U. L. A. 196 (1931) PA. STAT. ANN. (Purdon, 1930) tit. 69, § 204. The question of constructive fraud is thus left to the common law of the various jurisdictions. The rules as to the effect of retention of possession vary widely. See 1 U. L. A. 197 (1931) *et seq.;* 1 WILLISTON, SALES (2d ed. 1924) 828 *et seq.*

[2] Some, by statute. See BIGELOW, FRAUDULENT CONVEYANCES (1911) 384; 2 MOORE, FRAUDULENT CONVEYANCES (1908) 517 *et seq.*

[3] Section Twenty-six of the Sales Act, quoted *supra* note 1, covers situations of actual *mala fides.*

[4] The Statute of Elizabeth, 13 ELIZ. c. 5 (1570), and its modern prototype, the UNIFORM FRAUDULENT CONVEYANCE ACT, declare that where inadequate consideration has been given for the chattel sold, the sale shall be void as against creditors of the vendor. PA. STAT. ANN. (Purdon, 1930) tit. 39, § 354. In such cases, the transference of possession is of course immaterial. See McLaughlin, *Application of the Uniform Fraudulent Conveyance Act* (1933) 46 HARV. L. REV. 404.

[5] Shipler v. New Castle Paper Products Corp., 293 Pa. 412, 143 Atl. 182 (1928); Sterling Commercial Co. v. Smith, 291 Pa. 236, 139 Atl. 847 (1927); Northrop v. Finn Constr. Co., 260 Pa. 15, 103 Atl. 544 (1918).

[6] Future creditors who rely on the semblance of ownership to grant credit are not included. See Delman v. Raule, 124 Pa. 225, 16 Atl. 819 (1889).

[7] The rights of subsequent purchasers are covered by § 25 of the Sales Act. PA. STAT. ANN. (Purdon, 1930) tit. 69 § 203.

the vendor, there must be an unequivocal transfer of possession to the vendee, apparent to third persons.[8] Cases where the problem of sufficiency of transfer has been reviewed by upper courts are unavoidably confused, and each must ultimately rest upon its own facts.[9] In dealing with the cases, it would seem that the courts have conceived of ownership as dependent not only upon the intention of the parties, but also upon objective appearances.[10] And it is evident that the courts are often influenced by moral considerations which logically are unrelated to the primarily objective problem of sufficiency of change of possession.[11] So, in the principal case, evidence that the parties to the sale intended the transaction to be a "mere rigmarole" was reviewed in considering the transfer of the chattel. The factual situation[12] is typical of many where the equities appear balanced and nice distinctions must be made.[13] In rendering judgment *n. o. v.*, the court in a large measure exercised its own discretion. The holding indicates a judicial tendency to favor the creditors of an insolvent.

TAXATION—WILLS—RIGHT OF ADMINISTRATOR OF TESTAMENTARY DONEE TO ACCEPT OR REJECT GIFT—Husband and wife made reciprocal wills, each leaving his entire estate to the other. Both suffered an automobile accident wherein the husband was instantly killed and the wife died after three days of continuous unconsciousness. They were survived by one infant child. Four months later the administratrix *c. t. a.* of the wife's estate formally refused to accept the estate of the husband. This was done to effectuate an intestate transfer of the husband's estate to the child, thus avoiding a double transfer inheritance tax. In appraising the wife's estate for taxation purposes the comptroller included the value of the husband's estate. On appeal the assessment was affirmed. *Held,* that the wife's administratrix had failed to reject within a reasonable time, and had thereby accepted. *In re Howe's Estate,* 163 Atl. 234 (N. J. 1932).

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[8] Bowersox v. Weigle & Myers, 77 Pa. Super. 367 (1921); C. Trevor Dunham, Inc. v. Van Orsdale, 82 Pa. Super. 72 (1923).

[9] *Cf.* Summit Hosiery Co. v. Gottschall, *supra* note 8; Horten v. Colonial Finance Corp., 90 Pa. Super. 460 (1927); Wendel v. Smith, 291 Pa. 247, 139 Atl. 873 (1927); Shipler v. New Castle Paper Products Corp., *supra* note 5.

[10] The principle that a sale is void as to the vendor's creditors where the vendor retains possession is not based upon estoppel in *pais* against the vendee, since it is not necessary that the creditor rely upon the semblance of ownership in giving credit or making his attachment. See BIGELOW, *op. cit. supra* note 2, at 374. It is, rather, an unyielding rule growing out of the necessity of protecting creditors, in situations where the *mala fides* of the sale is difficult of proof, but a suspicion attaches to that sort of transaction.

[11] Freedman v. Avery, 89 Conn. 439, 94 Atl. 969 (1915); Foss v. Towne, 98 Vt. 321, 127 Atl. 294 (1925). An exception is usually made where the chattel is difficult of removal. Long v. Knapp, 54 Pa. 514 (1867). The subsequent possession must not be concurrent with that of the vendor. Ziegler & Co. v. Handrick, 106 Pa. 87 (1884). But where it is clear that the vendor became merely the agent of the vendee, the sale may be upheld. Summit Hosiery Co. v. Gottschall, 292 Pa. 464, 141 Atl. 298 (1928).

[12] Although the vendee apparently acted in good faith, and fair consideration was given, the surrounding circumstances, none of them conclusive indications, considered together, influenced the minds of the court, and perhaps created a suspicion of a secret trust. The fact that plaintiff occupied a confidential relation to the vendor does not conclusively point toward fraud against creditors. See Hubbard v. United Wireless Tel. Co., 62 Misc. 538, 115 N. Y. Supp. 1016 (1909). Nor does the fact that a certificate of title was not immediately obtained by plaintiff. Braham & Co. v. Steinard-Hannon Motor Co., 97 Pa. Super. 19 (1929). Employment of vendor by vendee after sale is not conclusive that transfer was fraudulent. Gray v. Little, 97 Cal. App. 442, 275 Pac. 870 (1929).

[13] Compare the factual situation in the present case with that in Mack v. Holsopple, 67 Pa. Super. 291 (1917).

Although there is a presumption of acceptance of a beneficial legacy or devise,[1] a testamentary donee has an elective right to refuse the benefaction, thereby avoiding the incidents of taxation.[2] The principal case is the first instance of an attempt by the personal representative of a donee to exercise this right. The nature of the right of not being compelled to take property against one's will would seem to justify the conclusion that it descends to the administratrix. The interests motivating the normal choice would probably be chiefly proprietary rather than personal.[3] Moreover, unlike the right of a widow to renounce her husband's will in order to take a dower or statutory interest,[4] such a right is not designed to benefit a particular class only.[5] There is, however, a clear intimation by the court that, even had the rejection occurred within a reasonable time, it might none the less have been declared invalid, inasmuch as it was done not for the best interests of the decedent donee's "estate", but for the benefit of the child.[6] This treatment of the problem is hardly realistic. It refuses to recognize the fact that the child is at once the heir at law of her father and the heir at law of her mother. The rights incidental to each capacity are regarded as separate as though distinct legal entities were involved. An administrator represents all those persons having claims in the decedent's assets.[7] It is to them that he owes the duty of exercising prudence in administration.[8] If all the claimants consent to a disclaimer for the purpose of receiving an indirect benefit, only through the use of a fiction can the act be considered detrimental to the interests of the "estate". The reasoning of the court presents a practical paradox: An acceptance would be materially beneficial to the "estate" and yet cause a loss to the sole claimant.[9]

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[1] Yawger's Ex'r v. Yawger *et al.*, 37 N. J. Eq. 216 (1883); JARMAN, WILLS (6th ed. 1910) 556. If the property were onerous there would, of course, be no presumption of acceptance. See Commissioner of Banks v. McKnight, 183 N. E. 720, 724 (Mass. 1933) (a trustee in bankruptcy is not obligated to accept title to stock if in his opinion it is worthless or likely to become a burden).

[2] *In re* Stone's Estate, 132 Iowa 136, 109 N. W. 455 (1906); *In re* Wolfe's Estate, 89 App. Div. 349, 85 N. Y. Supp. 949 (1903); see (1933) 31 MICH. L. REV. 443. But see *In re* Buckius' Estate, 17 Pa. C. C. 270 (1895). PINKERTON AND MILLSAPS, INHERITANCE AND ESTATE TAXES (1926) § 62.

[3] The court realized, however, that other than pecuniary considerations might influence the election. "It may be assumed that the mother herself might validly have rejected the gift for that purpose [to benefit the daughter]; but it cannot be said with certainty that she would have done so. . . ." Principal case at 238.

[4] In such cases it has uniformly been held that the right dies with the widow, notwithstanding that she herself was unable to exercise it within the period allotted. Penhallow v. Kimball, 61 N. H. 597 (1882); McClintock's Estate, 240 Pa. 543, 87 Atl. 703 (1913); Van Steenwyck v. Washburn, 59 Wis. 483, 17 N. W. 289 (1883); see Harding's Adm'r v. Harding's Ex'r, 140 Ky. 277, 130 S. W. 1098 (1910); POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 513, n. (c); Note (1905) 2 L. R. A. (N. S.) 959.

[5] The policy of the law is to make just provision for the widow personally. The benefits of her right of dissent were not intended to extend to her estate or her kinspeople after her death. *Re* Estate of Connor, 254 Mo. 65, 162 S. W. 252 (1913); *In re* Estate of Mihlman, 140 Misc. 535, 251 N. Y. Supp. 147 (1931); see Note (1911) 35 L. R. A. (N. S.) 1210. The opinions generally say that the widow's action in electing would be measured by considerations other than mere property motives, whereas heirs and creditors of her estate would be guided solely by pecuniary interests. In this connection see Sherman v. Newton, 6 Gray 307 (Mass. 1856).

[6] Principal case at 238.

[7] See 2 WOERNER, AMERICAN LAW OF ADMINISTRATION (3d ed. 1923) § 199.

[8] Agne v. Schwab, 123 App. Div. 746, 108 N. Y. Supp. 487 (1908); see Stone *et al.* v. Elliott, 182 Ind. 454, 106 N. E. 710 (1914); *In re* Roach's Estate, 50 Ore. 179, 92 Pac. 118 (1907); 3 SCHOULER, WILLS, EXECUTORS, AND ADMINISTRATORS (6th ed. 1923) § 1397.

[9] A carefully drafted tax statute should provide against the contingency presented in the instant case. See 26 U. S. C. A. § 1095 (a) (2) (1932 Supp.) exempting property acquired by the decedent within five years prior to his death through a taxable transfer.